Supreme Court, U. S.
FILED
OCT 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472
(919) 642-7151

Counsel for Petitioner

October 27, 1978

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes and rules involved	4
Statement of the case	5
Reasons for granting the writ	12
1. The decision below has a significant impact on the national policy of eliminating discrimination against handicapped individuals	12
2. The decision below raises an important problem in interpreting the "otherwise qualified handicapped individual" language of Section 504	15
3. The decision below poses a critical problem as to the degree of affirmative action that colleges and universities must take with respect to seriously handicapped persons	19
4. The decision below raises important problems as to whether and when a private right of action may be implied from the broad language of Section 504	21
Conclusion	27
Appendix A – Order and opinion of Court of Appeals	1a
Appendix B – Findings of fact and conclusions of law of District Court	12a

CITATIONS

Cases: Page

Barnes v. Converse College,
436 F. Supp. 635 (D.S.Car. 1977) 21

Bartels v. Biernat,
427 F. Supp. 226 (E.D. Wis. 1977) 21

Cannon v. University of Chicago,
559 F.2d 1063 (7th Cir. 1976, 1977), cert. granted
as No. 77-926 . . . . . 23, 24

Camenisch v. University of Texas,
No. A-78-CA-961 (W.D. Tex., May 17, 1978) 21

Cort v. Ash,
422 U.S. 66 (1974) 24

Crawford v. University of North Carolina,
440 F. Supp. 1047 (M.D.N.C. 1977) 22, 26

Doe v. New York University,
442 F. Supp. 522 (S.D.N.Y. 1978) 22, 26

Drennon v. Philadelphia General Hospital,
428 F. Supp. 809 (E.D. Pa. 1977) 21

Duran v. City of Tampa,
430 F. Supp. 75 (M.D. Fla. 1977) 21

Halderman v. Pennhurst State School,
446 F. Supp. 1295 (E.D. Pa. 1977) 21

Kampmeier v. Nyquist,
553 F.2d 296 (2nd Cir. 1977) 21

Lau v. Nichols,
414 U.S. 563 (1974) 22, 23

Page

Leary v. Crapsey,
566 F.2d 863 (2nd Cir. 1977) 21

Lloyd v. Regional Transportation Authority,
548 F.2d 1277 (7th Cir. 1977) 21, 22, 23, 24, 25, 26

Rogers v. Frito-Lay, Inc.,
433 F. Supp. 200 (N.D. Tex. 1977) 22

Sherer v. Maier,
No. 77-0594-CV-W-4 (W.D. Mo., Nov. 2, 1977) 22

United Handicapped Federation v. Andre,
558 F.2d 413 (8th Cir. 1977) 21

Vanko v. Finley,
440 F. Supp. 656 (N.D. Ohio, 1977) 22, 26

Statutes and Rules:

Civil Rights Act of 1871, § 1983 . . . . . 2, 5

Civil Rights Act of 1964, 42 U.S.C. §2000d 22

Rehabilitation Act of 1973, Sec. 504, 29 U.S.C. §794 . . 2, 4, *passim*

H.E.W. Regulations, §84.3(k)(3) 4, 17

H.E.W. Analysis of Regulations 4, 17

Miscellaneous:

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 24

Brooks, Section 504 of the Rehabilitation Act of 1973
and the Private College: Barnes v. Converse, 29 Mercer
L. Rev. 745 (1978) 22

Page

Guy, The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues, 7 Baltimore L. Rev. 183 (1978) . . . 22

O'Neill, Discrimination Against Handicapped Persons – The Costs, Benefits and Economic Impactof Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (1977) 20

President's Commission on Employment of the Handicapped, One in Eleven – Handicapped Adults in America: A Survey Based On 1970 U.S. Census Data 13

Wright, Equal Treatment of the Handicapped by Federal Contractors, 26 Emory L.J. 65 (1977) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Southeastern Community College, the petitioner, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 28, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 574 F.2d 1158, and is reprinted in Appendix A hereto, p. 2a, *infra.*

The opinion of the United States District Court for the Eastern District of North Carolina, in the form of findings of fact and conclusions of law, is reported at 424 F.Supp. 1341, and is reprinted in Appendix B hereto, p. 12a, *infra.*

JURISDICTION

Frances B. Davis, the respondent, brought this civil action under the Rehabilitation Act of 1973, 29 U.S.C. §794, and under the Civil Rights Act of 1871, 42 U.S.C. §1983, complaining that the petitioner College had unlawfully denied her admittance to its nursing program because of her admitted hearing disability. On December 22, 1976, the District Court entered a final judgment dismissing the action for lack of constitutional and statutory merit. See Appendix B, p. 12a, *infra.*

On the respondent's appeal, the Fourth Circuit on March 28, 1978, affirmed the District Court's judgment in part, vacated the judgment in part, and remanded the case to the District Court for further proceedings. See Appendix A hereto, p. 2a, *infra.* On June 29, 1978, the Fourth Circuit denied both a petition for rehearing and a suggestion for rehearing en banc, although there were dissents from both denials. See Appendix A hereto, p. 1a, *infra.* On September 18, 1978, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including October 27, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that no "otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in . . . any program or activity receiving Federal financial assistance." The questions here presented are:

1. Whether Section 504 of this Act precludes a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.

2. Whether Section 504 of this Act impliedly imposes upon colleges and universities an affirmative obligation to provide preferential but modified educational opportunities for the seriously handicapped who seek admission to highly skilled professional programs.

3. Whether Section 504 of this Act impliedly gives rise to a private right of action in a federal court by a handicapped individual who has been denied admission to a college's nursing program because of the physical handicap.

4. Whether, if such a private right of action is implied, the handicapped applicant must first pursue and exhaust available H.E.W. administrative remedies respecting individual complaints of discrimination.

STATUTES AND RULES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§84.3 *Definitions.*

As used in this part, the term:

* * * * * * * * * * * * * * *

(k) "Qualified handicapped person" means:

* * * * * * * * * * * * * * *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

Definitions – 5. *"Qualified handicapped person."* paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the

word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

STATEMENT OF THE CASE

Respondent Davis brought this civil action in the District Court for the Eastern District of North Carolina against the petitioner Southeastern Community College, a public educational institution located at Whiteville, N.C. The District Court found that it had subject matter jurisdiction under 28 U.S.C. §1343(3) to consider two federal statutory claims asserted by Davis:

(A) A claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, alleging that the College had unlawfully discriminated against Davis by denying her admission to its Associate Degree Nursing Program by reason of an obvious and admitted hearing disability; and

(B) A claim under the Civil Rights Act of 1871, 42 U.S.C. §1983, alleging that the College, by denying her admission on that basis, had also denied Davis the right to due process and equal protection of the laws. This §1983 claim, however, is not presently in issue, the Fourth Circuit having rested its decision solely on considerations stemming from Section 504 of the Rehabilitation Act. See footnote 4 of the opinion below, p. 5a, *infra.*

The relevant factual predicates of the Section 504 issues are found in the twelve Findings of Fact rendered by the District Court after a full evidentiary hearing. See Appendix B hereto, pp. 13a-17a, *infra*. For the most part, those findings are uncontested, and reflect the following facts of record:

(1) The central fact in this case is that Davis, according to an independent audiologist associated with Duke University Medical Center, has long had "a severe impairment of her ability to hear, which was detected early in the admission process," and "has a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear . . . [and] a speech discrimination loss which results in remarkable difficulty in understanding speech because of the distortion in her hearing." Finding 7.[1] However, by using a hearing aid and reading lips, "she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others." Finding 7. While Davis was found to be aware of gross sounds in the listening environment and to reach the outer limits of normal hearing levels with the use of hearing aids, the audiologist concluded that Davis "can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." Pl. Ex. 8.

---

[1] According to the audiologist's report (Pl. Ex. 6), Davis reported that she had had this hearing loss for many years, that her father and two sisters have significant hearing losses, and that she had worked in a dry cleaning plant for three years. She was born in 1932. Pl. Ex. 4.

It is unquestioned that Davis is a "handicapped person" within the statutory sense. 29 U.S.C. §706(6), quoted by the District Court at p. 19a, *infra*.

(2) In 1967, Davis was duly qualified by the North Carolina authorities as a Licensed Practical Nurse. While there was no evidence that she was continuously employed in that position, the license is currently in good standing. But the testimony at trial indicated that a Licensed Practical Nurse, unlike a Licensed Registered Nurse, "operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." Finding 5.

(3) Davis was enrolled at the petitioner College during the 1973-74 academic year in the undergraduate College Parallel program, designed as preparatory for entrance into the College's Associate Degree Nursing Program. The latter program was structured to train persons to become eligible for testing and licensing, by North Carolina authorities, as Registered Nurses. Findings 2, 4.

(4) Davis successfully completed her courses in the College Parallel program, and thereupon sought admission to the Associate Degree Nursing Program. The College had established criteria for admission to that program, including not only scholastic criteria but an evaluation of the physical condition of the applicant.[2] At the time of Davis' application in 1974, there were in excess of 100 applicants for admission and only 45 available positions to be filled for the quarter in which Davis applied. Finding 6.

(5) In implementing the College's admission criteria, Davis was interviewed by professional members of the Col-

---

[2] The College's admission criteria, made available to all prospective applicants for the Associate Degree Nursing Program, required that the following item be included in each student's application folder: "Medical record – serious consideration given to existing health problems." Pl. Ex. 3. See also Finding 12.

lege's nursing program staff to determine her suitability for admission to the program. Because of her obvious hearing impairment, Davis was referred to an independent audiologist at Duke University Medical Center for an evaluation of her hearing disability. The findings and conclusions of the audiologist have been summarized in Paragraph (1) above; see also Pl. Exs. 6, 8, and Finding 7.

(6) In the course of its review of Davis' suitability for the nursing program, the College submitted the audiologist's reports to the Executive Director of the North Carolina Board of Nursing and requested her advice as to Davis' acceptability as a potential Registered Nurse. The Executive Director responded (Pl. Ex. 11) that

> ". . . Mrs. Davis's hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, . . . we would question the advisability of you and the faculty's assuming responsibility for Mrs. Davis's involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with Mrs. Davis's hearing limitations could in fact, be the same as denying her full learning to meet the objectives of your nursing programs.
>
> "The basis for our opinions is found in the audiologist's response to you from Duke University on April 25, and the relationship of this response to expectations of nurses in patient care. . . . Both you and I can identify innumerable patient care situations in which this lady's abilities as defined in the [audiologist's response] would be inadequate for her probably to identify all of the patient's needs for which

> she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.
>
> ". . . We would urge the college in counselling Mrs. Davis to alter her career goal, as we do not believe, on the basis of facts we have now, that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program."

The Executive Director supplemented these opinions in responding further to the College's inquiry whether Davis' hearing difficulties would prevent her from being licensed as a Registered Nurse by the state Board of Nursing (Pl. Ex. 14). While the Executive Director could not presently predict eligibility several years hence for taking the licensing examination, she did state that

> ". . . one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse. . . includes evidence that an applicant has no limitations, physically, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license. From the facts presented . . . and the audiologist's report of Mrs. Davis's hearing capacity it is our opinion that Mrs. Davis has hearing limitations which could interfere with her safely caring for patients. This very situation, also in our opinion, could be highly frustrating to Mrs. Davis. . . .
>
> "We reiterate that each applicant for the licensing examination must provide evidence that

he/she is able, if licensed, to practice nursing as legally defined without any restriction."

(7) In addition to noting these opinions of the Executive Director, the District Court further found that the testimony at the hearing showed "that in many situations such as an operation room, intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible" and that "in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." Finding 8.

(8) The District Court found that the College had denied Davis' application for admission upon the basis of these medical tests respecting her hearing defect. The College admissions authorities, in other words, concluded that Davis had a physical "inability and incapacity to serve in the Associate Degree Nursing Program" and felt that "she would be unable to serve as a Registered Nurse on completion of such program." Finding 9.

(9) Following the denial of Davis' application for admission in May of 1974, Davis visited the Office of the President of the College in June and asked that her application be reviewed again and reconsidered. This reconsideration request was granted, and a committee of staff nurses at the College reviewed all the available material, tests and records. This committee again voted to deny Davis' application. Davis made no further attempts to gain review through college procedures, although the record indicates that the College had a procedure for resolving intramural grievances that Davis could have invoked. But the District Court found that in these circumstances "all parties concerned

knew that the institution of any such [grievance] procedures would be, in essence, futile." Finding 10.

(10) At the evidentiary trial, Davis offered no testimony. She rested her case on the various letters, tests and other exhibits, referred to in the foregoing paragraphs, that had been offered into evidence by stipulation. The College, on the other hand, offered the testimony of various members of its nursing admissions staff, as well as the President of the College, all of whom testified to the effect that Davis "was not qualified or suitable for the Associate Degree Nursing Program by reason of her hearing disability." Finding 11. But Davis did elicit an admission, on cross-examination of the College's witnesses, that with special training and individual supervision she could perform adequately in some selected fields of training. See p. 20a, *infra*.

After noting that "the single major factor" in the denial was "her projected inability to be licensed as a Registered Nurse after graduation," the District Court concluded that such a denial was neither arbitrary nor capricious. See p. 18a, *infra*. And the District Court further concluded, on the implicit assumption that a private right of action lies under Section 504, that the College had not violated the Act. Section 504 was construed to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity. See p. 20a, *infra*.

On appeal, the Fourth Circuit panel held unanimously that the District Court had erred in its reading of Section 504, particularly in light of certain H.E.W. regulations that post-dated the District Court determination. Davis' hearing

handicap, said the panel, could not be considered by the College in determining whether she was "otherwise qualified" – within the meaning of Section 504 – for admittance to the nursing program. Hence the panel vacated and remanded the Section 504 portion of the District Court judgment so that the latter court could focus upon Davis' academic and technical qualifications for admission. And on that remand, the District Court was directed to give "close attention" to Davis' request for some form of "affirmative relief" by way of modifying the nursing program so as to accommodate Davis and her hearing disability. See pp. 8a-10a, *infra*.

The Fourth Circuit panel also affirmed the implicit ruling of the District Court that a private right of action is available under Section 504. But the panel suggested that on the remand the District Court might want to consider the doctrines of administrative exhaustion and primary jurisdiction, matters which had been raised on rehearing but not resolved by the Fourth Circuit.

Chief Judge Haynsworth, one of the members of the panel that heard the appeal, dissented from the denial of the College's petition for rehearing. And Judges Russell and Widener dissented from the denial of rehearing en banc, stating that "they would affirm the judgment of the district court." See p. 1a, *infra*.

REASONS FOR GRANTING THE WRIT

1. *The decision below has a significant impact on the national policy of eliminating discrimination against handicapped individuals.*

This is the first case to reach this Court involving the meaning and scope of Section 504 of the Rehabilitation Act of 1973, which imposes a negative duty on all public and

private sector programs using federal financial aid not to discriminate against the handicapped. The significance of a proper initial interpretation and application of Section 504 by the federal judiciary cannot be overemphasized. The resolution of the statutory problem presented in this case, even though arising for the first time, can well affect the course of future litigation and, more importantly, can affect the career opportunities of countless seriously handicapped persons. In addition, the judicial solution of this initial statutory problem can have a lasting impact on the structuring and financing of the many federally-aided programs in which the handicapped may participate.

Approximately 11,000,000 Americans between the ages of 16 and 64, or one out of every eleven, have been identified as members of the so-called handicapped minority.[3] Half of these handicapped Americans are presently unemployed and their training and integration into an already underemployed work force raises difficult problems. Fundamental changes are being wrought by statute, regulation and practice, as well as by public mores, in response to the growing recognition that one should not suffer discrimination or denial of employment or career opportunities solely because of one's physical handicap. Section 504 is one of the important Congressional responses of this category.

At the same time, the nature of some physical handicaps may make it unwise and unsafe to permit a handicapped person equal access to certain programs, activities or professions. And it passeth belief that Congress intended to compel institutions of higher learning to admit those who are totally or substantially unqualified in the physical sense,

---

[3] President's Commission on Employment of the Handicapped, One in Eleven – Handicapped Adults in America: A Survey Based On 1970 U.S. Census Data 2 (1977).

whatever their academic qualifications. A one-armed student simply cannot perform many of the physical skills required of one being trained to become a surgeon; and to license him to perform surgery, even if he were allowed to attend and complete medical school, would endanger the patients and make a mockery of the program. The instant case illustrates just that kind of problem. The District Court found that respondent's hearing disability rendered her "unable to function properly" in various nursing situations she would confront both as a student nurse and a Registered Nurse, and posed "potential danger to future patients in such situations." See p. 20a, *infra*. Any viable anti-discrimination policy, including that embodied in Section 504, must certainly take into account the career limitations imposed by such a handicap. And it must weigh the policy of non-discrimination against the dangers to public and individual safety that may adhere if the physical disabilities are totally to be ignored in all situations. This consideration augments the appropriateness of review of the decision below.

Moreover, the anti-discrimination policy articulated in Section 504 has significant financial repercussions on the agencies and institutions that provide the activities available to the handicapped. The recipients of federal financial aid, including colleges and universities, normally assume certain burdens and responsibilities in providing additional facilities and assistance for the handicapped. But such burdens, particularly without additional federal financial assistance, can become intolerable and counter-productive if they must be incurred to provide extraordinary facilities and safety measures to accommodate those who, however high may be their academic qualifications, are physically incapable of properly performing the physical requirements of the program in question.[4] Such would indeed be the unfortunate result if the "affirmative relief" suggested by the Fourth Circuit were to be implemented in this case. See pp. 8a-10a, *infra*.

[4] This consideration is among those that impelled various States to file an *amici* brief in support of the petitioner both in the Fourth Circuit and before this Court.

The Fourth Circuit has rendered a decision that brings these various factors into sharp focus. In effect, it has interpreted Section 504 in such a way that no kind of physical handicap can be considered a disqualification for admission to any federally-financed program designed to train one for a profession or trade necessitating a total and effective use of human physical skills. It is enough, says the Fourth Circuit, if the severely handicapped individual has the academic and technical qualifications for admission; the institution must then take whatever affirmative steps are necessary including program modifications, to train the blind person to drive or the deaf nurse to perform as a Registered Nurse. That decision, if left unreviewed, can have a devastating and lasting impact upon the federal anti-discrimination policy, to say nothing of the astronomical costs, risks and potential dangers to health and safety that could ensue from training a nurse or doctor who is physically unable to cope with certain medical situations.

2. *The decision below raises an important problem in interpreting the "otherwise qualified handicapped individual" language of Section 504.*

Section 504 states that no "otherwise qualified handicapped individual" shall be excluded from participation in any federally-aided program or activity "solely by reason of his handicap." But nothing in the terse language of Section 504 identifies precisely what is meant by the "otherwise qualified" reference.

The District Court sought to give these words their common or dictionary meaning, and concluded that "these words qualify the passage to mean that no person may be excluded from a federally assisted program or activity sole-

ly by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." See p. 20a, *infra*. Under the District Court's reading, Section 504 would make it impermissible "to exclude a blind or deaf person from admission to a law school, if academically qualified," but entirely permissible "to exclude a person without sight from a position as a truck driver or to refuse a person who must read lips to a position as a telephone operator." *Ibid.* In short, the court interpreted "otherwise qualified" to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." *Ibid.*

Contrariwise, the Fourth Circuit interpreted "otherwise qualified" to mean that the handicapped applicant is otherwise qualified under academic and technical requirements. In so interpreting the words, the Fourth Circuit made no independent analysis of the common meaning of the words or the statutory context in which they appear; nor did it consider what results might follow from its reading. Its treatment of the problem began and ended with a quotation from an H.E.W. regulation (45 C.F.R. § 84.3 (k)), issued subsequent to the District Court's decision, that defines not an "otherwise qualified handicapped person" but simply a "qualified handicapped person." Under that H.E.W. definition, a "qualified handicapped person" means

> ". . . a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's [postsecondary or vocational] education program or activity."[5]

[5] The Fourth Circuit also made reference to the H.E.W.'s official explanation of this definition contained in §84.3(k) (3). According to that explanation (42 Fed. Reg. at 22687):

(continued)

The Fourth Circuit's reading of Section 504 would appear highly suspect and, indeed, impermissible. Certainly Congress could not have intended to mandate the admission of academically and technically qualified handicapped persons whose handicaps are such as to preclude satisfactory, full and safe participation in the training program. Certainly the Fourth Circuit did not seek to support its interpretation of Section 504 by reference or citation to any bit of legislative history. The fact is that there is no such legislative support, and the result reached by the deeply divided Fourth Circuit can only be ascribed to an overly-literal reading of English words.

Perhaps the most severe critique of the Fourth Circuit's result comes from the H.E.W., whose regulations the court deemed decisive of the issue. In its official analysis of §84.3(k) (3), the very regulation relied upon by the Fourth Circuit, the H.E.W. has explained that it deliberately omitted the word "otherwise" in the phrase defined by §84.3(k) (3) precisely because, as has happened in this case, it might lead to a literal reading of the statutory reference to "otherwise qualified handicapped individual" and to a result "clearly . . . not intended by Congress." H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376. According to this analysis, which was available to but not utilized by the Fourth Circuit,

> ". . . the omission of the word 'otherwise' [from the §84.3(k) (3) definition] is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for

[5] (Continued)

> ". . . both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question."

> their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly such a result was not intended by Congress."

In sum, the Fourth Circuit's reading of the "otherwise qualified" language has been repudiated by the governmental agency charged with administering Section 504. The court simply did not read far enough into the clarifying H.E.W. regulations and analyses thereof. More significantly, the court's interpretation of the Section 504 language appears to produce a result at odds with the intent of Congress, with the plain meaning of words when read in context, and with common sense. The result of mandating the admittance of handicapped individuals into programs for which they are not physically qualified is far too serious, viewed solely in terms of the safety of those whose very lives may depend upon the availability of able-bodied treatment and assistance, to escape consideration and review of the problem by this Court.

The fact that the Fourth Circuit remanded the case to the District Court to consider the academic and technical qualifications of the respondent does not affect the need or appropriateness for this Court's plenary review at this juncture. In every sense, the Fourth Circuit has rendered a "final" interpretation of the Section 504 language. And by remanding the case for consideration of some form of affirmative action or modification of program in order to train a seriously handicapped person in a profession for which she is physically unsuited, the Fourth Circuit has exacerbated the finality of its misreading of the Section 504 provisions.

The decision below will stand as a dangerous precedent, unless reviewed by this Court, that all institutions must disregard the effect that physical disabilities may have upon

one's capacity to meet the physical demands of a program or of a profession. The time for review of that precedent is now.

3. *The decision below poses a critical problem as to the degree of affirmative action that colleges and universities must take with respect to seriously handicapped persons.*

In remanding the instant case to the District Court, the Fourth Circuit directed that "close attention" be paid to respondent Davis' claim, based on certain H.E.W. implementing regulations, that the petitioner College could be "required to modify the nursing program so as to accommodate the plaintiff and her hearing disability." See p. 8a, *infra*. Such potential affirmative action or relief was deemed supportable "even when such modifications become expensive." See p. 9a, *infra*.

Viewed particularly in the context of a seriously handicapped person seeking admission to a professional program requiring a high degree of physical skills, this affirmative action call by the Fourth Circuit becomes of transcendent importance to all colleges and universities throughout the land. It is one thing to require accommodation to the seriously handicapped who seek to pursue general arts and sciences programs or the more intellectual-type graduate programs, such as the study of law or accounting. It is quite another thing to require modification of certain other programs, such as nursing or medicine, to accommodate those who are incapable of performing all the physical skills required of the student and the ultimate professional.

The basic premise of the Fourth Circuit's affirmative action suggestion is faulty, for it assumes that Section 504 requires the admission of the seriously handicapped to those programs that demand full physical ability and dexterity.

Not even the H.E.W. has suggested that a blind person must be taught how to drive a bus, no matter how "otherwise qualified" he may be. But the Fourth Circuit has ruled otherwise. And if its faulty premise is accepted, then only two courses of affirmative action are open to those colleges and universities that seek to train highly skilled professionals:

(1) Action might be taken to try the hazardous if not the impossible, to train the blind person to drive a bus. To do so, of course, would be at a prohibitive cost to the nation's higher education system, a factor which the Fourth Circuit has already stated is irrelevant.[6] And there would be a concurrent risk to public safety and health, as well as to the well-being of the seriously handicapped person himself.

(2) Alternatively, as the Fourth Circuit seemed to suggest in footnote 6 of its opinion, p. 6a, *infra*, modifications might be made in the skilled professional programs so as to train the seriously handicapped on a preferential basis but only within the limits of the handicap. The blind or deaf person would then be trained to do only what a blind or deaf physician or nurse could do. Such professions would then tend to become stratified, with various classes of doctors or nurses capable of performing only those tasks consistent with their physical capabilities. A true revolution in these professions would then have occurred.

Neither the language nor the legislative history of Section 504 would appear to require or justify either alternative.

---

[6] It has been estimated that the annual pecuniary cost to recipients of federal aid of complying with Section 504 will be about 3.2 billion dollars. O'Neill, Discrimination Against Handicapped Persons—The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (May 4, 1977) (unpublished report prepared for the HEW office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77), p. 65.

But if such is to be the result of the affirmative action required by the Fourth Circuit, review by this Court is an utter necessity. The resulting imposition on the federal courts of the duty of framing and perhaps supervising such affirmative action programs is still another factor justifying the most serious consideration by this Court.

4. *The decision below raises important problems as to whether and when a private right of action may be implied from the broad language of Section 504.*

The Fourth Circuit determined that the District Court's implicit finding that respondent Davis could pursue a private right of action under Section 504 was "legally sound," citing what it called the "sound reasoning" of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977). Certain other Circuits have similarly cited the *Lloyd* ruling as indicative of the "probable" existence of such an action. *Kampmeier v. Nyquist*, 533 F.2d 296, 299 (2nd Cir. 1977) (stating that the *Lloyd* reasoning is "fairly persuasive here" so that it is "probable" that the *Kampmeier* plaintiffs had standing to bring such action); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Leary v. Crapsey*, 566 F.2d 863, 865 (2nd Cir. 1977). Some federal district courts have also cited the *Lloyd* decision in concluding that a private right of action can be implied from Section 504.[7]

---

[7] See *Bartels v. Biernat*, 427 F. Supp. 226, 229-230 (E.D. Wis. 1977); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809, 916 (E.D. Pa. 1977); *Duran v. City of Tampa*, 430 F. Supp. 75, 77 (M.D. Fla. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D. S.Car. 1977); *Halderman v. Pennhurst State School*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977); *Camenisch v. University of Texas*, No. A-78-CA-961 (W.D. Tex., May 17, 1978).

Other district courts have stressed the peculiar facts and timing involved in *Lloyd* and have recognized that a private right of action is "probably" available only under certain circumstances.[8]

But the foundations of the "sound reasoning" of *Lloyd* have been described as tenuous at best and in need of reconsideration.[9] Moreover, there are hard problems raised by the decision below in the instant case that simply were not addressed or answered in *Lloyd*. It would be unfortunate, therefore, if the *Lloyd* rationale were to be allowed to pick up speed as the leading authority for the proposition that Section 504 gives an implied right of action to any and all handicapped applicants who are denied admission to a federally-financed program. The problems that need the definitive answers that only this Court can give may be summarized as follows:

(1) Much of the *Lloyd* rationale is dubious, outdated and in dire need of reconsideration. Thus, after noting that Section 504 tracks Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, the *Lloyd* court asserted that *Lau*

---

[8] See *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1055 (M.D.N.C. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 203-204 (N.D. Tex. 1977); *Doe v. New York University*, 442 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977); *Sherer v. Maier*, No. 77-0594-CV-W-4 (W.D. Mo., Nov. 2, 1977).

See also the divided district court authorities cited in Wright, Equal Treatment of the Handicapped by Federal Contractors, 26 Emory L.J. 65, 98, note 108 (1977); Guy, The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues, 7 Baltimore L. Rev. 183, 204, note 70 (1978).

[9] Brooks, Section 504 of the Rehabilitation Act of 1973 and the Private College: *Barnes v. Converse*, 29 Mercer L. Rev. 745, 751-756 (1978).

v. Nichols, 414 U.S. 563 (1974), held that Section 601 provided a private cause of action – ergo Section 504 provides a cause of action for the handicapped applicant. The difficulty here is that *Lau* made no attempt to discuss or resolve the private right of action issue; the Court simply declared a particular educational practice violative of Section 601.[10]

Indeed, the Seventh Circuit itself has repudiated this notion that *Lau* is controlling as to the existence of a private right of action as to a similar analog, Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. In *Cannon v. University of Chicago*, 559 F.2d 1063, 1072 and 1083 (7th Cir. 1976, 1977), both in the original decision and on rehearing, the Seventh Circuit acknowledged (p. 1083) that "*Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a private right of action here under the comparable provisions of Title IX [Section 901]." It would seem equally clear that the Seventh Circuit has repudiated that portion of its *Lloyd* opinion that relied upon *Lau* for the proposition that Section 504 gives rise to a private right of action. *Lau* is no longer thought to provide a precedential base for imply-

---

[10] In *Lau*, the Court held that a public school system's failure to provide English instruction for 1800 students of Chinese ancestry who did not speak English was a denial of an equal educational opportunity and hence violative of Section 601. The suit had been brought as a class action, but the Court did not discuss or confront the problem as to the right to bring such a suit. See 414 U.S. at 568. Mr. Justice Blackmun's concurrence stressed the large number of children involved who were being deprived of any meaningful education. See 414 U.S. at 572. Mr. Justice Stewart's concurrence stated that the critical question at issue was whether certain H.E.W. guidelines and regulations went beyond the authority of Section 601. 414 U.S. at 571.

ing a private right of action under Section 504, or any analogs thereof.

Further elucidation of this matter is likely upon this Court's review of the *Cannon* decision, now awaiting oral argument before the Court. No. 77-926.

(2) Alternatively, the *Lloyd* court held that a private right of action could be had under Section 504 by resort to the doctrine of implication, as developed by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1974). But it is questionable whether the second and third facets of that doctrine,[11] relating to legislative intent, have been satisfied in the case of Section 504. In commenting on the 1974 amendments to the Rehabilitation Act, the Senate Committee on Labor and Public Welfare noted that Section 504 would "permit a judicial remedy through a private action," but seemingly only after there had been some administrative implementation of a compliance program.[12] There is not a word in Section 504 or in its legislative history that permits or contemplates an independent private action by the handicapped person prior to any kind of administrative action by the H.E.W.

---

[11] In *Cort*, this Court found four factors relevant in determining whether a private judicial remedy is implicit in a statute not expressly providing one: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally related to state law, thus rendering it inappropriate to infer a cause of action based on federal law. 422 U.S. at 78.

[12] S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974), reprinted at [1974] U.S. Code & Admin. News, 6373, 6390-6391.

Indeed, the *Lloyd* court permitted a private action in that case only because no administrative enforcement procedures had at that time been established, an omission that has now been cured. In footnote 29 of the *Lloyd* opinion, 548 F.2d at 1286, the Seventh Circuit stated:

> "We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review . . . . And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review."

Since a "meaningful administrative enforcement mechanism" has now been established, the time has come to fill in what was deliberately left open by the *Lloyd* footnote, i.e., to determine if only a post-administrative judicial review is possible under Section 504. Where, as in the instant case, a private suit is brought that is clearly of the pre-administrative variety, it is no longer possible simply to cite the *Lloyd* ruling – as the Fourth Circuit did – as authority for implying a pre-administrative private right of action from the stark language of Section 504. Only this Court can remove the cloud of uncertainty as to what kinds of private rights of action, if any, can be instituted by handicapped individuals under Section 504.

(3) If some sort of private right of action is to be found at the post-administrative stage, the doctrine of exhaustion

of administrative remedies, as well as the doctrine of primary jurisdiction, might become dispositive of any attempt by a handicapped individual to institute suit at the pre-administrative stage. Several district courts, attempting to follow the implications of the *Lloyd* decision, have barred private suits under Section 504 where the plaintiffs have not exhausted the new H.E.W. administrative remedies dealing with discrimination complaints. *Doe v. New York University*, 422 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977); and see *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977) (primary jurisdiction).

The Fourth Circuit sought to avoid the implications of the exhaustion and primary jurisdiction doctrines, which had been raised at the rehearing stage, by suggesting that the District Court consider these matters on the remand. See footnote 9 of the opinion below, p. 11a, *infra*. Just why a remand was necessary to resolve such legal propositions was not made clear. Such matters should and can be considered and resolved as part of the continuing problem of determining what private remedies are available under Section 504 and when they may be invoked.

Here, too, these problems need definitive resolution by this Court.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472

Counsel for Petitioner

October 27, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1237

Frances B. Davis,

Appellant,

v.

Southeastern Community College,

Appellee.

Disability Rights' Center and
Mr. James Cherry,

Amicus Curiae.

ORDER

The appellant's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. One judge in active service requested a poll on the suggestion for rehearsing en banc but the suggestion did not carry. Judge Russell and Judge Widener dissent from the denial of rehearing en banc and they would affirm the judgment of the district court.

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Butzner. Judge Haynsworth dissents from the denial of the petition for rehearing.

Filed June 29, 1978

For the Court,

/s/ William K. Slate, II
Clerk

Frances B. DAVIS, Appellant,

v.

SOUTHEASTERN COMMUNITY COLLEGE, Appellee.

No. 77-1237.

United States Court of Appeals,
Fourth Circuit.

Argued Jan. 9, 1978.

Decided March 28, 1978.

Marc P. Charmatz and Sy Dubow, The National Center for Law and The Deaf Legal Defense Fund, Washington, D.C. (Philip A. Diehl and Warren L. Pate, Moses, Diehl & Pate, Raeford, N.C., on brief), for appellant.

Edward L. Williamson, Whiteville, N.C. (Benton H. Walton, III, Williamson & Walton, Whiteville, N.C., on brief), for appellee.

Charles E. Hill, Douglas L. Parker and Mark A. Barenstein, Washington, D.C., (on brief) for amicus curiae Disability Rights Center and James Cherry.

Before HAYNSWORTH, Chief Judge, and BUTZNER and HALL, Circuit Judges.

K. K. HALL, Circuit Judge:

Frances B. Davis, a Licensed Practical Nurse ("LPN"), appeals from a final judgment entered against her in a civil action filed under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, ("the Act"). The Southeastern Community College ("college"), located in North Carolina, was the named defendant, and Ms. Davis complained that the

college unlawfully denied her admittance to the college's Associate Degree Nursing Program ("program"), which would ultimately lead to certification as a Registered Nurse ("RN"), because of her admitted hearing disability.

Following a trial to the court, the district judge held: (1) that the plaintiff did not have to exhaust further administrative remedies as a precondition to suit; (2) that the plaintiff was not denied any constitutional or property rights, under either due process or equal protection clauses of the Constitution, [42 U.S.C. § 1983]; and (3) that the plaintiff, although plainly a "handicapped individual" within the meaning of 29 U.S.C § 706(6), was not discriminated against within the strictures of 29 U.S.C. § 794. *Davis v. Southeastern Community College*, 424 F.Supp. 1341 (E.D.N.C.1976). We affirm in part, and vacate in part and remand.[1]

I.

PRIVATE RIGHT OF ACTION

[1] Although the district court did not make a specific legal finding as to whether or not the plaintiff could pursue a private right of action under Section 504 of the Act, we believe that such a finding was at least implicit, and was legally sound. On this point, we affirm,[2] and we adopt the sound reasoning of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977). *See also United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2nd Cir. 1977); *Hairston v. Drosick*, 423

---

[1]Except as supplemented in this opinion, the facts are adequately set forth by the district court in its published opinion, *Davis v. Southeastern Community College, supra.*

[2]In a later case, the same district judge that decided the case now before us squarely held that Section 504 of the Act did confer a private right of action to sue upon a handicapped person. *See Barnes v. Converse College*, 436 F.Supp. 635, 638 (D.S.C. 1977).

F.Supp. 180 (S.D.W.Va.1976); *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D.W.Va.1976).

II.

ADMINISTRATIVE EXHAUSTION

[2] As the district court noted, once the plaintiff was formally denied admission to the college's nursing program, she sought an additional, yet informal, reconsideration through the Office of the President of the college. In fact, her application was reconsidered by a committee of nurses who were on the staff at the college and who availed themselves of all relevant materials and records concerning the plaintiff. They reaffirmed their refusal to admit plaintiff to the nursing program. *Davis v. Southeastern Community College, supra*, at 1343-4, ¶¶9, 10.

On appeal, the college contends that since it had an established grievance procedure,[3] and since the plaintiff did not pursue her denial of admittance to the nursing program through the tiers of that grievance procedure, then her suit in federal court is effectively barred.

We disagree with the college, hold that the processing of plaintiff's grievance beyond that which she had already achieved would indeed have been "futile," and affirm that holding for the reasons adequately stated by the district

---

[1]The procedural framework at the college for airing grievances was generally structured as follows:

a. Discussion with the person who was the source of grievance;

b. Written presentation of the grievance to the student's dean and to the staff members' superior or dean;

c. Appeal to a special grievance committee composed of seven members (three students; two faculty members; two administrators);

d. Appeal thereafter to the President of the College.

Defendant's Exhibit 25.

court. *Davis v. Southeastern Community College, supra*, at 1343-4, at ¶¶9, 10, and A.[4]

III.

THE SECTION 504 CLAIM

Our holding on the merits of plaintiff's Section 504 claim is rather narrow. We vacate and remand that portion of the district court judgment which has not been affirmed here, and hold that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability. The college may consider such other relevant subjective and objective factors as it deems appropriate, consonant of course with a fair and essentially uniform application of those same subjective and objective factors utilized in the consideration of other candidates for enrollment in the nursing program. For instance, past academic performances would undoubtedly be a highly relevant factor governing admissibility to the nursing program.[5]

---

[4]Since we dispose of this appeal on the Section 504 grounds, we only note in passing that plaintiff's suit was also brought under 42 U.S.C. § 1983 in which administrative exhaustion is not required as a precondition to suit. *See McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976).

[5]At oral argument, we were informed by counsel for the college that the plaintiff had scored well below average on the reading placement test.

The record on plaintiff's academic performance is at best mixed. The plaintiff's transcripts of prior academic work were made part of the record in this case and they reflect above average performance with a range of grades from C to A.

We express no opinion concerning the scholastic suitability of the plaintiff to pursue her studies toward an RN degree. However, the record does reflect that the large number of applicants for a limited number of available positions in the nursing program undoubtedly creates keen competition for admission to the nursing program.

We reach this result because the district court erred when it found that plaintiff was not "otherwise qualified" pursuant to Section 504 of the Act, 29 U.S.C. § 794, for admission to the college's nursing program.

The court below defined the key statutory terminology, "otherwise qualified," as contained in 29 U.S.C. § 794, in their ordinary common meaning since, at the time the case was decided, there had not been any definitive interpretations of those terms. *Davis v. Southeastern Community College, supra,* at 1345, decided December 22, 1976. Thus, "otherwise qualified" was defined to mean that the plaintiff had ". . . to [be] otherwise able to function sufficiently in the position in spite of [her] handicap, if proper training facilities [were] suitable and available." *Id.* However, since plaintiff's hearing deficiencies would prevent her from safely performing the clinical training leading to her RN degree and would, after graduation, restrict her in the pursuit of her proposed profession, then in the district court's view she was not "otherwise qualified." *Id.*[6]

[6]We do not have before us the question of "limited" verses "unlimited" certification of the plaintiff as an RN. It was touched on briefly at oral argument, however.

Plaintiff's ability to read lips aids her in overcoming her hearing disability; however, it was argued that in certain situations such as in an operating room environment where surgical masks are used, this ability would be unavailable to her.

Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly the plaintiff could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

If the plaintiff meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N.C.Gen.Stat. §§ 90-158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers.

Approximately six months after the district court decided *Davis*, on June 3, 1977, the regulations implementing Section 504 of the Act, promulgated by the Department of Health, Education and Welfare ("HEW"), became effective.[6a] 42 Fed.Reg. 22676 (May 4, 1977). Among these regulations, now embodied in 45 C.F.R. Part 84, is one which addresses the particular definitional problem presented on this appeal. Title 45 C.F.R. § 84.3(k)(3) requires that:

> With respect to post-secondary and vocational education services [an otherwise qualified handicapped person is one] . . . who meets the *academic* and *technical* standards requisite to admission or participation in the recipient's education program or activity.

[Emphasis added.][7]

The official explanation provided by HEW for this definition indicates that:

> . . . both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question.

42 Fed. Reg. at 22687.

[3] Thus, we hold the district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program, *Davis v. Southeastern Community College, supra,* at 1345, rather than by

[6a]See *Cherry v. Mathews*, 419 F.Supp. 922 (D.D.C.1976), for the history of the suit against HEW to compel it to promulgate regulations under § 504 of the Act, 29 U.S.C. § 794. *See also* n.9, *post.*

[7]HEW construes "qualified" and "otherwise qualified" synonymously under the regulations. 42 Fed.Reg. at 22686.

focusing upon her academic and technical qualifications as required by the newly promulgated regulations. We reach this result by applying the law which is in effect at the time we render our decision, *Thorpe v. Housing Authority*, 393 U.S. 268, 281, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); *see also Cort. v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), and note that other courts of appeals have been required to vacate and remand Section 504 cases to the lower courts for reconsideration in light of applicable regulations which antedated their decisions. *See United Handicapped Federation v. Andre*, 558 F.2d 413, 416 (8th Cir. 1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1287-8 (7th Cir. 1977).[7a]

IV.

AFFIRMATIVE RELIEF

Since this case will be returned to the district court for further proceedings, we believe it would be appropriate, as guidance for the court below, to briefly discuss plaintiff's claim that the district court also erred by failing to consider that the college could be required to modify the nursing program so as to accommodate the plaintiff and her hearing disability. Plaintiff bases her entitlement to such "affirmative relief" also upon Section 504 of the Act, 29 U.S.C. § 794, and upon certain designated sections of the HEW regulations under Section 504.[8]

[7a] We limit our holding and our interpretation of the above-quoted regulations to the facts of this particular case. We do not, at this time, absent a more fully developed record below, wish to expand further upon the regulations, their reasonableness, or their scope.

[8] Plaintiff relies upon 45 C.F.R. §§ 84.42(a); 84.43(c); 84.44(a); 84.44(d); and 84.12(a). As hereinbefore noted, this listing of regulations is furnished only as illustrations to the district court of the argument advanced for the first time in this court on appeal. Of course, as we note in this opinion, repeatedly, the application and interpretation of the HEW regulations lie, in the first instance, with the district court.

The position of the college was relatively clear — it was not prepared, from a faculty viewpoint, to adequately supervise and train the plaintiff during her clinical training. Therefore, it could not modify its program to compensate for plaintiff's hearing disability.

We believe the district court should give close attention, on remand, to the regulations upon which plaintiff relies, which are cited in footnote 8 of this opinion, and especially to 45 C.F.R. § 84.44(a), *Academic requirements*, which requires that:

> A recipient . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. * * Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion 9f degree requirements, and adaptation of the manner in which specific courses are conducted.

and to 45 C.F.R. § 84.44(d)(1), *Auxiliary aids*, which requires that:

> A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

Additionally, precedent likewise supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive. *See e.g. United Handicapped Federation v. Andre*, 558 F.2d 413, 415-6 (8th Cir. 1977);

Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1281-84 (7th Cir. 1977); *Barnes v. Converse College*, 436 F.Supp. 635, 637 (D.S.C.1977); *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D.W.Va. 1976).

V.

OTHER CLAIMS— DAMAGES, DUE PROCESS, AND EQUAL PROTECTION

Both parties to this appeal presented other issues for our consideration. For the reasons stated below, we decline to pass upon them.

The college complains that plaintiff's attempt to secure monetary damages against it is precluded by the Eleventh Amendment immunity accorded the state, and its institutions. The district court below did not rule upon any damage request by the plaintiff, and indeed, ruled against her. Plaintiff did not raise the damage question on appeal, and we thus hold that any issue of damages could not, under any conceivable appellate theory, be before us and decline to discuss it further.

[4] The plaintiff also argued that the district court's decision, upholding her exclusion from the nursing program, denied her due process of law and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Because this appeal, thus far, has been disposed of on nonconstitutional, statutory grounds, we have no need to reach the constitutional questions which the plaintiff presented below. *See Gurmankin v. Costanzo*, 556 F.2d 184, 186 (3rd Cir. 1977); *Lloyd v. Regional Transportation Athority*, 548 F.2d 1277, 1280 (7th Cir. 1977).

Accordingly, the judgment is

AFFIRMED in part; VACATED in part; and REMANDED.[9]

---

[9]The district court entered judgment for the defendant on December 22, 1976. *Davis v. Southeastern Community College*, *supra*. Thereafter, HEW promulgated the regulations applicable to Section 504, see n.6, *supra*, which regulations *presumably* became effective on June 3, 1977. 42 Fed.Reg. 22676 (May 4, 1977); *but see* 45 C.F.R. §84.6(c).

On remand, and since the advent of the HEW regulations, the district court might also deem it advisable to consider other legal issues which we did not reach in this opinion, namely: (1) What is the effective date concerning the relevant sections of the HEW regulations, if any? (2) Did the promulgation of the Section 504 regulations by HEW, and specifically, 45 C.F.R. §§ 84.6-84.10, and separately 45 C.F.R. §§ 80.6-80.10 and 45 C.F.R. Part 81 create administrative relief that must be exhausted? (3) Is the doctrine of "primary jurisdiction" applicable, and if so, how? (4) Should administrative exhaustion and/or "primary jurisdiction" be applicable, should plaintiff be awarded any relief *pendente lite*?

Of course, we express no opinion on the merits concerning these issues, but at least one court has grappled with these issues that are not before us. *Crawford v. University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C.—Magistrate's Findings and Order adopting same, entered Sept. 1, 1977, and Nov. 1, 1977, respectively; C-77-173-D; Ward, U.S.D.J.) (deaf handicapped graduate student seeking to compel provision of an interpreter to aid him in completing his school work); *see also Lloyd v. Regional Transportation Authority*, *supra*, at 1286, n.29.

APPENDIX B

Frances B. DAVIS, Plaintiff,

v.

SOUTHEASTERN COMMUNITY COLLEGE, Defendant.

Civ. A. No. 75-0041-CIV-3.

United States District Court,
E.D. North Carolina,
Fayetteville Division.

Dec. 22, 1976.

Warren L. Pate, and Philip A. Diehl, Raeford, N.C., for plaintiff.

Edward Williamson, of Williamson & Walton, Whiteville, N.C., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HEMPHILL, District Judge.

This is an action brought by plaintiff under the provisions of 42 U.S.C. § 1983 alleging that the defendant institution denied plaintiff equal protection of the law and due process in denying her admission to the Associate Degree Nursing Program of defendant institution, and under 29 U.S.C. § 794 alleging that plaintiff was discriminated against by the defendant institution in denying her admission because of a hearing disability. After hearing and considering the testimony adduced at trial, and considering the various pleadings, exhibits, and submissions taken into evidence,

including a review of the court's notes taken at the time of trial, upon the credible evidence presented, the court publishes the following:

FINDINGS OF FACT

1. The court has jurisdiction of the subject matter of this claim pursuant to 28 U.S.C. § 1343(3).

2. That plaintiff is a citizen and resident of Robeson County, North Carolina, and was enrolled at the defendant institution during the 1973-74 academic year in the College Parallel program. This College Parallel program is designed as a preparatory program for entrance into the Associate Degree Nursing Program.

3. That the defendant institution is a community college established under Chapter 115-A of the General Counsel Statutes of North Carolina as a public educational institution operating by and through a duly appointed and qualified Board of Trustees as authorized by said statute.

4. That the Associate Degree Nursing Program was one of the academic programs administered by the defendant institution and that plaintiff made application for admission to said program for the fall quarter beginning in September 1974. It appears uncontroverted from the testimony adduced at trial that the purpose for the establishment and maintenance of the Associate Degree Nursing Program was to train people for licensing as Registered Nurses pursuant to the statutes of North Carolina. In accordance with the admission criteria of the college for the Associate Degree Nursing Program, the plaintiff was interviewed by professional members of the college staff involved in the nursing program for the purpose of evaluating the suitability of the plaintiff for admission to the Associate Degree Nursing Program. The reports of such evaluation have been offered into evidence (see plaintiff's exhibits Nos. 23 and 34) and commented on

in testimony and conclude that the plaintiff was not qualified to be admitted to the program. Subsequently an Admissions Review Committee considered the application of plaintiff and determined by reason of her severe hearing impairment that she is not a qualified applicant for training as a Registered Nurse.

5. That plaintiff successfully completed her schedule of classes for the 1973-74 school term prior to her application for admission into the Associate Degree Nursing Program. Plaintiff also is a duly qualified Licensed Pratical Nurse, having been granted such professional license by the State of North Carolina in 1967, and which license is currently in good standing. From the testimony presented at trial, it appears that a Licensed Practical Nurse, unlike a Licensed Registered Nurse, operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication.

6. That the defendant institution had an established criteria for admissions of students to the Associate Degree Nursing Program and the standards and objectives established by the college included an evaluation of the physical condition of the applicant. Furthermore, there were in excess of 100 applicants for admission to the Associate Degree Nursing Program and only 45 available positions to be filled for the quarter in which plaintiff had applied for admission.

7. That plaintiff had a severe impairment of her ability to hear, which was detected early in the admission process. As a result of this condition, she was referred to an audiologist at Duke Hospital to advise and to determine the extent of her hearing difficulty. The hearing test administered by Dr. Burton B. King, Audiologist, indicated that plaintiff had bilateral sensorineural hearing loss. (Plaintiff's exhibits Nos. 6, 7 and 8). This report indicated that plaintiff has a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear. She has a speech discrimination

loss which results in remarkable difficulty in understanding speech because of the distortion in her hearing. However, she understands speech better in her right ear. She wears a hearing aid to assist her hearing in the right ear and she uses her vision to supplement her hearing and understanding speech. In this respect she is an excellent lip reader and although she does not possess normal hearing, she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others. She is well aware of gross sounds occurring in the listening environment but can only be responsible for speech spoken to her or when the talker gets her attention and allows her to look directly at the talker. The hearing aid improves her hearing level to the outer limits of normal hearing levels.

8. That a report of the audiologist was reviewed by Mary McRee, Executive Director of the North Carolina Board of Nursing, who advised the Director of Nursing at the defendant institution that the plaintiff's abilities, based upon the report of the audiologist, would be inadequate to the patient's needs, "in fact, it would be inadequate for her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations which could be quite critical to the point of life, death situations." (See plaintiff's exhibits Nos. 10 and 11.) It was also brought out in testimony that in many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgial masks which would make lip reading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means.

9. That the defendant institution denied the plaintiff's application for admission upon the findings of the medical tests performed with respect to her inability and incapacity

to serve in the Associate Degree Nursing Program and their feelings that she would be unable to serve as a Registered Nurse on completion of such program.

10. That following the denial of plaintiff's application for admission by the Admissions Committee, the plaintiff, in an informal and nonscheduled visit to the Office of the President of the defendant institution in the month of June, 1974, asked that her application be again reviewed and reconsidered. This was done by a committee of the nurses who were on the staff of said college, and that all of the material and records then available were sent to said committee who again voted to deny plaintiff's application. After having her application reconsidered and refused a second time the plaintiff made no further attempt to gain review through college procedures. Although it appears from the record that the defendant institution had a procedure for resolving intramural grievances, it is obvious that after consideration, reconsideration and final refusal of the plaintiff's application for admission, that all parties concerned knew that the institution of any such procedures would be, in essence, futile.

11. That plaintiff offered no testimony at the trial of the case but rested her case upon the introduction of the exhibits which were offered into evidence by stipulation of the parties and which constitute a part of the proper record. That the defendant offered the testimony of Mrs. Annie Odum, who was associated with the Nursing Program at the defendant college and who had been one of the persons who interviewed the plaintiff with respect to her suitability and qualifications to be admitted to the Associate Degree Nursing Program. That defendant further offered Mrs. Virginia Riggio who was the Director of Nursing at the defendant institution when plaintiff's application was submitted and who also reviewed the record of plaintiff with respect to her suitability and qualifications for the program. Defendant further offered Mrs. Julie Stocks who was counselor to the plaintiff upon her admission to the

college, a Dr. W. Ronald McCarter, President of Southeastern Community College, Mrs. Peggy Berry, staff members of the college and member of the Admissions Committee, Dr. Dan Moore, Dean of the college, and Mrs. Sue Shaw, Clinical Instructor at the college. The evidence adduced from said witnesses was to the effect that the plaintiff was not qualified or suitable for the Associate Degree Nursing Program by reason of her hearing disability.

12. The defendant institution offered into evidence as one of its exhibits the admission criteria of the college to the Associate Degree Nursing Program which was further testified to by the defendant's witnesses who had evaluated the qualifications and suitability of the plaintiff for the Associate Degree Nursing Program. The President of the College and the Dean of the College also testified with respect to the procedures and their application to the case at bar.

Having made the foregoing findings of fact, the court, reaches the following:

CONCLUSIONS OF LAW

A. The court finds it unnecessary to determine whether plaintiff was required to exhaust all administrative remedies prior to bringing this suit under the cited cases of *Damico v. California*, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967), and *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Even if plaintiff had additional administrative remedies which could be followed, it is apparent to the court that resort to these remedies would have proved futile to the plaintiff.

B. That defendant institution was empowered by the Legislature of North Carolina pursuant to North Carolina General Statute, § 108-14(4) (1963) to apply the standards and requirements for admission and graduation of students and other standards established by the State Board of

Education. The admission to a state community college is a privilege and not by itself a constitutional or property right, subject to the exception that the rules and regulations for admission are not arbitrary or unreasonable. *Flemming v. Adams*, 377 F.2d 975 (10th Cir. 1976), *cert. denied* 389 U.S. 898, 88 S.Ct. 219, 19 L.Ed.2d 216; *Keys v. Sawyer*, 353 F.Supp. 936 (S.D.Tex.1973); *see also, San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The plaintiff has offered no testimony to attack the accuracy or reasonableness of the admissions standards of the defendant institution nor has she sent in any evidence of any arbitrary or capricious action on the part of the defendant institution in denying plaintiff admission to the Associate Degree Nursing Program. Furthermore, it appears from the testimony that the single major factor in the defendant's refusal to allow admissions to plaintiff was her projected inability to be licensed as a Registered Nurse after graduation (see plaintiff's exhibits Nos. 11, 13 and 14). A state has a great responsibility to provide training facilities for producing qualified persons for delivering health care to society. In view of the shortage of such personnel and the great number of applicants for the spaces available in such facilities, it is completely reasonable and logical for the state to limit enrollment to such persons as are able to meet professional qualifications upon graduation. Additionally, from the evidence presented at trial, it appears that it would be difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program. Thus, there is a complete lack of evidence and testimony in the case to establish a denial of the constitutional or property right by the defendant college to the plaintiff.

C. The plaintiff also contends that 29 U.S.C. § 794 keeps defendant institution from refusing to allow plaintiff's admission on the basis of her hearing disability. This section reads:

> Nondiscrimination under Federal grants
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 706(6) defines "handicapped persons" as follows:

> For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

It is the opinion of the court that plaintiff plainly falls within the statutory definition.

Plaintiff contends, quite simply, that by violating 29 U.S.C. § 794, defendant has denied her rights guaranteed under the "law of the United States," thus giving rise to a cause of action under 42 U.S.C. § 1983. 29 U.S.C. § 794 is part of a comprehensive legislative scheme to provide greater opportunity to handicapped individuals in the United States. This particular section of the Act, which was passed in 1973, has yet to be interpreted by the federal courts. For the purposes of this case, the two most important words in this section are the words "otherwise qualified". In construing statutes words should be given, whenever possible, their ordinary common meaning. In absence of prior legal definitions of this term, a resort to Webster's Third New International Dictionary reveals that the word "otherwise" is defined as "in other respects". "Qualified" is defined as "fitted for and given purpose". While these definitions are certainly not surprising, they

may be of some guidance in interpreting the meaning of the statute. Reasonably construed, these words qualify the passage to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap, renders the person unable to fully and effectively participate in the activity. By way of an illustration, under this section it would most probably be impermissible to exclude a blind or deaf person from admission to a law school, if academically qualified. However, reason dictates that it would be entirely permissible to exclude a person without sight from a position as a truck driver or to refuse a person who must read lips to a position as a telephone operator. Otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available. The major problem with the plaintiff's contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations. Defendant presented testimony from several witnesses that plaintiff would be unable to properly perform in the program even with an improved hearing aid. The plaintiff put up no testimony at all on this point except to elicit an admission on cross examiantion that with special training and individual supervision she could perform adequately in some selected fields of nursing. In view of this interpretation of the statute and the plaintiff's failure to establish her ability to complete the program and function as a Registered Nurse, the court can find no violation of 29 U.S.C. § 794 and thus no violation of 42 U.S.C. § 1983 based upon it.

In accordance with the foregoing reasons, let judgment be entered in favor of the defendant in this action.

AND IT IS SO ORDERED.